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United States Attorney
District of Arizona

2006 MAY 10 P 1:12

AZ CORP COMMISSION
DOCUMENT CONTROL

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40 North Central, Suite 1200
Phoenix, Arizona 85004-4408

Direct line: (602) 514-7748
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E-mail: Mark.Wenker@usdoj.gov

May 9, 2006

E-01750A-05-0579

Arizona Corporation Commission
Utilities Division
1200 West Washington
Phoenix, Arizona 85007

RE: Mohave Electric Cooperative, Inc.

To Whom It May Concern:

Enclosed for filing is an original and 13 copies of BIA's Notice of Dismissal of Mohave Electric's Declaratory Judgment Complaint and a copy to be file-stamped and returned to me in the enclosed stamped, self-addressed envelope.

Thank you.

Sincerely yours,

PAUL K. CHARLTON
United States Attorney
District of Arizona

Regina Lebaro, Legal Asst

MARK WENKER
Assistant United States Attorney

MW/rl
Enclosures

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION


IN THE MATTER OF THE COMPLAINT OF) DOCKET NO. E-01750A-0579
THE BUREAU OF INDIAN AFFAIRS,)
UNITED STATES OF AMERICA,) BUREAU OF INDIAN AFFAIRS'
AGAINST MOHAVE ELECTRIC) NOTICE OF DISMISSAL OF
COOPERATIVE, INC. AS TO SERVICES) MOHAVE ELECTRIC'S
TO THE HAVASUPAI AND) DECLARATORY JUDGMENT
HUALAPAI INDIAN RESERVATIONS) COMPLAINT

Mohave Electric Cooperative, Inc. ("Mohave") previously moved to stay this administrative action pending resolution of a separate state court declaratory judgment action. The United States removed the declaratory judgment action to federal district court and then moved to dismiss it. Over Mohave's objections, the district court granted the United States' motion and dismissed the declaratory judgment action. Attached as exhibits 1 and 2 are copies of the order granting the United States' motion to dismiss and the judgment of dismissal.

The underlying basis for Mohave's motion to stay this action no longer exists and the United States requests that it now be denied.

Respectfully submitted this 9 day of May, 2006.

PAUL K. CHARLTON
United States Attorney
District of Arizona


MARK J. WENKER
Assistant U.S. Attorney
Attorneys for the BIA, Havasupai
and Hualapai Nation

AZ CORP COMMISSION
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1 Original and 13 copies of the foregoing mailed
for filing this 9th day of May, 2006, to:

2 Docket Control Division
Arizona Corporation Commission
3 1200 West Washington Street
Phoenix, Arizona 85007

4 Copies of the foregoing mailed this
9th day of May, 2006, to:

5 Teena Wolfe, Esq.
Administrative Law Judge, Hearing Division
6 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

7 Christopher Kempley, Esq.
Chief Counsel, Legal Division
8 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

9 Keith Layton, Esq.
10 Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

12 Ernest Johnson
Director, Utilities Division
Arizona Corporation Division
13 1200 West Washington Street
Phoenix, Arizona 85007

14 Michael A. Curtis
William P. Sullivan
15 Larry K. Udall
Curtis, Goodwin, Sullivan, Udall & Schwab
2712 N. 7th Street
16 Phoenix, AZ 85006-1090

17 R. Lehar

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mohave Electric Cooperative Inc., an
Arizona Corporation,

Plaintiff,

vs.

United States of America; and Bureau of
Indian Affairs,

Defendants.

No. CV06-0082-PCT-NVW

ORDER

Before the court is Defendants' Motion to Dismiss (doc. # 5), the Response (doc. # 6), and the Reply (doc. # 9). Plaintiff seeks declaratory judgment against the United States of America and the Bureau of Indian Affairs *eo nomine* that Plaintiff's 1982 contract with the Bureau of Indian Affairs to supply electric power to the Hualapai and Havasupai Reservations expired without renewal. Defendants plead sovereign immunity.

Suit against the Government for breach of contract is at the historic core of the bar of sovereign immunity. The Tucker Act in 1887 waived federal sovereign immunity for breach of contract actions, 28 U.S.C. § 1491(a)(1), but only for money damages and not for equitable remedies. There is no general statutory waiver of sovereign immunity to allow declaratory judgment actions against the Government based on contract. Plaintiff does not argue to the contrary.

Rather, Plaintiff contends that the United States waived its sovereign immunity to this declaratory judgment action when the Bureau of Indian Affairs commenced proceedings before the Arizona Corporation Commission under state law to compel Plaintiff to continue providing electric service independent of the contract. When the Government commences litigation, it submits itself to the jurisdiction of the court for the claim in question. *The Siren*, 74 U.S. 152 (1868). The Government's pursuit of a money claim may allow a recoupment up to the amount of the Government's entitlement for a claim against the Government arising out of the same transaction. *United States v. Shaw*, 309 U.S. 495 (1940).

Plaintiff cites no authority, however, for the proposition that the Government's commencement of an action in one forum waives sovereign immunity for a suit against the Government in a different forum, even on the same claim. Moreover, the Bureau's complaint before the Corporation Commission is not to construe the contract or determine rights and obligations under it. There is no basis there to find a waiver of sovereign immunity to allow this action to proceed.

This action, filed in state court, was properly removed to this court under 28 U.S.C. § 1442(a)(1) as it is against both “[t]he United States” and “any agency thereof.” Upon proper removal, this court has jurisdiction and the responsibility to determine the applicability of federal sovereign immunity. Finding sovereign immunity applicable, this court's duty is to dismiss for lack of subject matter jurisdiction, not to remand to the state court which would have to do the same.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (doc. # 5) is granted.

IT IS FURTHER ORDERED that the clerk enter judgment dismissing this action for lack of subject matter jurisdiction. The clerk shall terminate this case.

DATED this 8th day of May 2006.



Neil V. Wake
United States District Judge

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mohave Electric Cooperative Inc., an Arizona Corporation,	}	No. CV06-0082-PCT-NVW
Plaintiff,		ORDER
vs.		
United States of America; and Bureau of Indian Affairs,		
Defendants.		

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3 before the Arizona Corporation Commission under state law to compel Plaintiff to continue
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5 litigation, it submits itself to the jurisdiction of the court for the claim in question. *The Siren*,
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20 court which would have to do the same.

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22 granted.

23 IT IS FURTHER ORDERED that the clerk enter judgment dismissing this action for
24 lack of subject matter jurisdiction. The clerk shall terminate this case.

25 DATED this 8th day of May 2006.


26
27 
28 _____
 Neil V. Wake
 United States District Judge

EXHIBIT 2

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mohave Electric Cooperative Inc.,

Plaintiff,

v.

United States of America; Bureau of Indian
Affairs,

Defendant.

JUDGMENT IN A CIVIL CASE

CV-06-0082-PCT-NVW

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed May 9, 2006, judgment is entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and complaint and action are dismissed.

May 9, 2006

RICHARD H. WEARE

District Court
Executive/Clerk

s/ Deborah N. Herman

By:
Deputy Clerk

cc: (all counsel)